have found (albeit that this was not pleaded by the defendants but referred to in the affidavit sworn by R. M. K. Naidu on the 9th of December, 1961) that the plaintiff was a moneylender and, there being no suggestion that he was licensed as such, that the loans made by the plaintiff were illegal and void and hence not recoverable by him."

This defence was not pleaded.

Now it is well settled law that where a contract is *ex facie* illegal, the court will decline to enforce it, irrespective of whether illegality is pleaded or not.

The position is succinctly stated by Devlin J. in *Edler* v. *Auerbach* [2] at p. 697 cited with approval in *Snell* v. *Unity Finance Ltd.*[3] at p. 55 in this way:—

"That case" (*North-Western Salt Co., Ltd.* v. *Electrolytic Alkali Co., Ltd.* [1914] A.C. 461) "authorises, I think, four propositions: first, that where a contract is *ex facie* illegal, the court will not enforce it whether the illegality is pleaded or not; secondly, that where, as here, the contract is not *ex facie* illegal, evidence of extraneous circumstances tending to show that it has an illegal object should not be admitted unless the circumstances relied on are pleaded; thirdly, that where unpleaded facts, which taken by themselves show an illegal object have got in evidence (because, perhaps, no objection was raised or because they were adduced for some other purpose), the court should not act on them unless it is satisfied that the whole of the relevant circumstances are before it; but, fourthly, that where the court is satisfied that all the relevant facts are before it and it can see clearly from them that the contract had an illegal object, it may not enforce the contract, whether the facts were pleaded or not."

The court therefore ought not, on its own initiative, to refuse to enforce a contract on the ground of illegality unless it is quite certain that all the relevant facts are in evidence.

So far from being certain that all the relevant facts were before the court it appeared to me that essential evidence was missing.

The question of whether the plaintiff was a moneylender was disputed. The plaintiff was asked if he was a moneylender but he denied it and also the fact that the defendants had ever paid him interest. The matter was never explored in any detail nor given that close examination, it should have received and no doubt would have if it had been in issue and pleaded.

In these circumstances it is impossible to say that all the relevant circumstances relating to the question of whether the plaintiff was a moneylender or not were before the court.

I have come to the conclusion that the plaintiff is right in his contention that the third of those propositions enunciated by Devlin J. covers this case i.e. the court will not act on unpleaded facts unless it is satisfied that the whole of the relevant circumstances are before it.

For these reasons, in my judgment, this ground of appeal also fails.

There is, in my opinion, no substance in the remaining grounds argued on the appeal. They relate to findings of fact and I am unable to see any reason for disturbing them. There was evidence to support them and it was eminently a matter for the learned trial judge as to whether he accepted that evidence or not. The inferences which he drew from the evidence were, in my view, open to be drawn and I can find no reason for dissenting from his conclusions.

In the result the appeal fails on all points and must be dismissed with costs.

Tan Ah Tah Ag.C.J. and **Ambrose J.** concurred.

Appeal dismissed.

Solicitors: *Pillai & Co.; L. Rayner.*

BRITISH AND MALAYAN TRUSTEES LTD. v. TAN LIAN CHYE & ORS.

[O.C.J. (Buttrose J.) October 7, 1965]

[Singapore — Originating Summons No. 8 of 1965]

Landlord and tenant — Agreement to licence and authorize the running of the business of an amusement park on land — Whether a licence or a tenancy.

The trustees sought an order that the agreement entered into between them and one Goh Eng Wah constituted a licence and did not create a tenancy. The agreement was to license and authorise Goh Eng Wah to run the business of an amusement park on the land in question. The trustees had no power to grant a lease and the trustees therefore sought the approval of the court for the agreement.

Held: on a consideration of the document as a whole the agreement in this case constituted a licence personal to Goh Eng Wah and did not create a tenancy; and therefore it could be approved by the court.

Cases referred to:—

(1) *Torbett* v. *Faulkner* [1952] 2 T.L.R. 659.

(2) *Finbow* v. *Air Ministry* [1963] 2 All E.R. 647.

ORIGINATING SUMMONS.

Y. R. Jumabhoy for plaintiffs.

Philip Hoalim for the 1st defendant.

Harry Wee for the 2nd defendant.

K. C. Chan for the corpus beneficiaries.

Peter Guok for Goh Eng Wah.

Buttrose J. (delivering oral judgment): This is a summons taken out by trustees, the plaintiffs in this originating summons, seeking an order that the agreement dated 12th of August, 1965 and was made between them and one Goh Eng Wah constitutes a licence personal to the said Goh Eng Wah and does not create a tenancy of the land and premises referred to therein. The summons also seeks the court's approval of the agreement.

When I first glanced through the papers before the hearing, I formed the tentative

opinion that it was not a matter which would present any great difficulty. At the commencement of the hearing on seeing the wealth of authority which counsel, through their industry, had assembled, I began to have doubts as to whether, perhaps, I had not been somewhat premature in coming to that opinion but having now had the benefit of the exhaustive arguments of all counsel, I remain of the opinion I originally formed that the matter was after all not so complex or difficult as it might appear.

It is unnecessary nor do I propose to refer to the various interlocutory applications and orders that have been made in this originating summons and of which this present application is the sequel.

The short point for decision is whether this agreement constitutes a licence or a tenancy. The agreement, on the face of it, purports to be a licence. Its sole object is to licence and authorise one Goh Eng Wah to run the business of an amusement park on the land in question. It is expressly declared in the licence that the licence is a licence to carry on the business of an amusement park, such licence being a personal right granted to the licensee. It is further declared, expressly and specifically, that the intention of the parties is not to create a tenancy or a lease.

Having considered the document as a whole and examined its various clauses, it seems to me clear that on the face of the agreement as it stands, the parties intended it to be a licence and not a tenancy. Here, therefore, we have the intention of the grantor, accepted by the grantee, to create a licence and not a tenancy and as was pointed out in *Megarry's* volume on the Rent Acts, 9th Edition at page 52 it would be wrong for the court to extract from the grantor an estate or interest in land in the teeth of the intention of the parties at all events if the words or document by which the transaction was effected are apt for a licence and not for a tenancy. The court, however, must look not so much at the words as the substance of the agreement. The relationship of the parties is determined by the law and not by the label which they choose to put on it. Do therefore the surrounding circumstances in any way affect or alter the express intention of the parties as disclosed in this agreement? I think not. The fact that the licensee is permitted to charge and collect admission fees to the amusement park or to collect licence fees or advertisement charges in respect of the buildings and erections in the park does not, in my view, confer on the licensee an interest in the land so as to constitute a tenancy. Such matters are, in my judgment, inseparable from and essentially a necessary adjunct to the efficient and successful running of the business of an amusement park. It is not, in my judgment, a grant to the licensee of benefits and profits arising out of the land itself.

The licence sought to be granted here is not, in my opinion, an estate or interest in land and at the close of the argument I was informed by counsel for Goh Eng Wah that he was prepared to amend the licence by adding at the end of clause 6 thereof the words "or any interest in land", and I direct that this amendment be made. The agreement itself, the surrounding circumstances, and the conduct of the parties all go to show, I think, that what was intended was that Goh Eng Wah was to have a personal licence or privilege to run the business of an amusement park with no interest in the land. He was merely to use the property in a certain way and on certain terms while the control to some extent remained with the trustees and they retain certain rights as to possession.

Furthermore, it is not open to the trustees to grant a lease, and this court has so held, and even a grant of exclusive possession may be only a licence and not a lease where the grantor, the trustees here, has no power to grant a lease. See *Torbett* v. *Faulkner* [1] and *Finbow* v. *Air Ministry*.[2]

Having said what I have, there is really nothing more to say. I hold that the agreement dated 12th of August, 1965 constitutes a licence personal to the said Goh Eng Wah and does not create a tenancy. The agreement submitted, as amended, is formally approved.

There will be an order in terms of prayers (1), (2) and (3) of the summons. Costs of and incidental to this application of all parties, save and except Goh Eng Wah, will be paid out of income. There will be liberty to all parties to apply.

Order granted.

Solicitors: *Mallal & Namazie, Philip Hoalim & Co.; C.J. Koh & Co.; K.C. Chan; Guok & Co.*

RE SYED EIDRUS ALSAGOFF; SYED MOHAMED ALSAGOFF v. POH KIM SAN & ORS.

[O.C.J. (Winslow J.) October 13, 1965]

[Singapore — Suit No. 675 of 1962]

Power of attorney — Forgery by agent — Execution of mortgage deed by person acting under forged power of attorney — Agent having no express or ostensible authority — Whether principal bound by act of agent.

Deed — Entrustment of title deeds by principal with agent — Agent mortgaging property using forged power of attorney — Whether principal bound — Negligence — Delay.

The plaintiff the executor of the estate of Syed Eidrus claimed a declaration that a number of mortgages and conveyances of properties of Syed Eidrus were null and void and for an order directing the Registrar